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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNA BOWMAN,
Plaintiff,
v.
VALENTINE & KEBARTAS, INC.,
Defendant.

No. 2:14-cv-1563-JAM-KJN PS

FINDINGS AND RECOMMENDATIONS

Plaintiff, at that time represented by counsel, commenced this action on July 2, 2014. (ECF No. 1.) However, on May 4, 2015, the district judge granted plaintiff’s counsel’s motion to withdraw. (ECF No. 14.) In the motion to withdraw, plaintiff’s former counsel indicated that plaintiff had not responded to any of his communications since at least December 2014. (ECF No. 12.) Plaintiff’s former counsel provided a last-known address for plaintiff, which the Clerk of Court has recorded in the court’s records. (Id.) Thereafter, on June 12, 2015, the case was referred to the undersigned pursuant to Local Rule 302(c)(21). (ECF No. 15.)

Subsequently, on June 15, 2015, the court issued an order directing plaintiff to file a brief statement indicating whether or not she intends to proceed with the action, and if so, whether she needs a brief period of time to obtain new counsel. (ECF No. 16.) Plaintiff was ordered to respond no later than July 2, 2015. (Id.) The court specifically cautioned plaintiff that failure to

1 timely respond to the order would be deemed to be plaintiff's consent to dismissal of the action,
2 and would result in a recommendation of dismissal pursuant to Federal Rule of Civil Procedure
3 41(b). (Id.)

4 Although the July 2, 2015 deadline has now long passed, plaintiff failed to respond to the
5 court's order; nor did plaintiff request an extension of time to do so. Accordingly, the court
6 recommends that the action be dismissed.

7 A court must weigh five factors in determining whether to dismiss a case for failure to
8 prosecute, failure to comply with a court order, or failure to comply with a district court's local
9 rules. See, e.g., Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). Specifically, the court
10 must consider:

11 (1) the public's interest in expeditious resolution of litigation; (2)
12 the court's need to manage its docket; (3) the risk of prejudice to
13 the defendants; (4) the public policy favoring disposition of cases
on their merits; and (5) the availability of less drastic alternatives.

14 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002); Ghazali v.
15 Moran, 46 F.3d 52, 53 (9th Cir. 1995). The Ninth Circuit Court of Appeals has stated that
16 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a
17 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.
18 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

19 In this case, the first two Ferdik factors strongly support dismissal, because plaintiff's
20 failure to communicate with her former counsel and failure to now respond to the court's orders
21 suggest that plaintiff is no longer interested in seriously and diligently pursuing this case. As for
22 the third Ferdik factor, although the defendant has not yet appeared, plaintiff's former counsel
23 represented that he had engaged in settlement discussions with defendant, but that he had been
24 unable to relay information regarding settlement discussions to plaintiff. (See ECF No. 12.)
25 Therefore, at a minimum, plaintiff's nonresponsiveness has prejudiced defendant's ability to
26 pursue potential early resolution of the case. Additionally, concerning the fifth Ferdik factor, the
27 court has already attempted less drastic alternatives by providing plaintiff with a reasonable
28 period of time to state whether she intends to proceed with the action and whether she requires

1 some additional time to obtain new counsel. The court also clearly cautioned plaintiff regarding
2 the potential consequences for failure to respond to the court's order. Nevertheless, plaintiff
3 ignored the court's order and did not even request an extension of time to comply. Finally, even
4 though the court prefers, consistent with the fourth Ferdik factor, to resolve cases on their merits,
5 plaintiff's own conduct precludes a resolution on the merits. In any event, the fourth Ferdik
6 factor is outweighed by the other Ferdik factors.


7 Accordingly, for the reasons outlined above, IT IS HEREBY RECOMMENDED that:

- 8 1. The action be dismissed pursuant to Federal Rule of Civil Procedure 41(b).
- 9 2. The Clerk of Court be directed to vacate all dates and close this case.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
15 shall be served on all parties and filed with the court within fourteen (14) days after service of the
16 objections. The parties are advised that failure to file objections within the specified time may
17 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
18 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

19 IT IS SO RECOMMENDED.

20 Dated: July 16, 2015

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23 KENDALL J. NEWMAN
24 UNITED STATES MAGISTRATE JUDGE
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